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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 717

LYNCHBURG TRAFFIC BUREAU (CORP.), *Petitioner,*

v.

SMITH'S TRANSFER CORPORATION OF STAUNTON, VIRGINIA, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COUNTER STATEMENT OF QUESTIONS PRESENTED

Petitioner states the questions it presents to be whether the Motor Carrier Act (Interstate Commerce Act, Part II, 49 U.S.C. 301-328) gives a remedy to a shipper against a motor common carrier for failing to comply with an order of the Interstate Commerce Commission directing the cancellation of rates found to be unjustly and unreasonably high and continuing to charge those rates for transportation after such an

order takes effect (Pet. for Cert. p. 3). As we shall show *infra* these questions cannot be before this Court in this case because the District Court found as a fact that Petitioner had failed to carry its burden of proving that Respondent had violated any order of the Interstate Commerce Commission, and further found as facts that the rates and charges Respondent assessed for the transportation it performed for Petitioner had not been found by the Commission to be unjustly or unreasonably high and had not been ordered cancelled, but, on the contrary, were the rates duly filed with the Commission and applicable to the transportation performed when it was performed. This holding and these findings of fact were affirmed by the Court of Appeals. Therefore, the only question reviewable by this Court is whether they are supported by substantial evidence. This is not the type of question which, under Rule 19 of this Court's Rules, justifies the grant of a writ of certiorari.

COUNTER STATEMENT OF THE CASE

Petitioner is a non-profit corporation created to assist shippers and receivers of freight in and near Lynchburg, Virginia in the pickup, consolidation, movement and local delivery of shipments. Respondent is a common carrier of property by motor operating in interstate commerce pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission at rates required to be filed with and regulated by the Interstate Commerce Commission pursuant to Sections 217 and 216 of the Interstate Commerce Act (49 U.S.C. 317, 316). From time to time during the years 1953 to 1959 Respondent transported various commodities for Petitioner's members from New York, New York to Lynchburg, Vir-

ginia. Petitioner filed two suits (Civil Actions No. 414 and 523 in the District Court for the Western District of Virginia) seeking to recover a portion of the charges it paid Respondent for said transportation. The only questions of law and the only disputed questions of fact being common to both suits, they were consolidated by order of the District Court.

The gravamen of the original complaint in No. 414, filed on February 25, 1958, was that the charges Petitioner paid Respondent were computed at rates that were unjust, unreasonable and discriminatory in violation of Section 216 of the Interstate Commerce Act (49 U.S.C. 316). Simultaneously with the filing of said complaint Petitioner filed a complaint with the Interstate Commerce Commission praying it, *inter alia,* to declare said rates "inapplicable, unjust and unreasonable, unjustly discriminatory, and unduly prejudicial", and to determine Respondent's lawful rates (Respondent's Exhibit 5). Thereupon the District Court, on motion of Petitioner, ordered further proceedings in No. 414 stayed pending action by the Commission on Petitioner's complaint to it.[1]

While Petitioner's complaint to the Interstate Commerce Commission was pending this Court rendered its opinion and judgment in *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464 (1959). It there held that one who has paid charges for transportation by a common carrier by motor computed at rates duly filed with the

[1] It is well settled that the Interstate Commerce Commission has exclusive jurisdiction to determine whether rates filed with it and subject to its regulation meet the criteria for lawfulness contained in Section 216 of the Interstate Commerce Act. See *United States of America* v. *Western Pacific Railroad Co.,* 352 U.S. 59 (1956) and cases there cited.

Interstate Commerce Commission pursuant to Section 217(a) of the Interstate Commerce Act (49 U.S.C. 317(a)) and applicable to the transportation performed has no right to recover any portion thereof, whether or not the rates violated Section 216 of the Act (49 U.S.C. 316), which Section it construed to create administrative criteria for the regulation of rates by the Commission rather than a justiciable legal right to be charged reasonable rates. See 359 U.S. at p. 469.

After the judgment in the *T.I.M.E.* Case became final Respondent filed a motion in No. 414 for judgment on the pleadings grounded on the holding therein. The District Court granted the motion. Petitioner appealed. *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, 285 F. 2d 743 (1961). The Court of Appeals stated Petitioner's position on appeal as follows, 285 F. 2d at p. 744:

> "It is the plaintiff's contention in this court that the carrier failed to publish the rates and charges 'fixed' by the Commission, but charged instead rates in excess of those so 'fixed.' The plaintiff thus seeks to distinguish the present case from T.I.M.E., maintaining that in T.I.M.E. the issue was the reasonableness of rates previously filed and not rejected or suspended by the Commission, whereas, here, it is said that the defendant had failed and refused to publish rates and charges which the Interstate Commerce Commission had 'required.'"

Respecting the foregoing contention the Court of Appeals said, 285 F. 2d at pp. 744-745:

> "If, indeed, we could perceive in the earlier proceedings [before the Interstate Commerce Commission] to which our attention has been called,

> (thought they were not made a part of the record), a plain order or orders of the Commission which had the effect of approving certain rates applicable to the shipments here in question, and the defendant's charges were in excess of such rates, the plaintiff might well have a case not falling within the T.I.M.E. ruling. We cannot so adjudicate on this record."

Because of its inability to "so adjudicate" the Court remanded the case to the District Court so that Petitioner might make application for leave to file an amended complaint "alleging facts, if they exist, which might entitle it to relief." 285 F. 2d at p. 745. In so doing the Court said, 285 F. 2d at pp. 745-746:

> "Before leave to amend is granted, the District Court should be satisfied by the plaintiff that the amended complaint will allege and the plaintiff intends to prove that the rates actually charged exceed the applicable *filed* rates; otherwise nothing could be gained by permitting amendment." (Emphasis the Court's).

Petitioner was allowed to file an amended complaint in No. 414 on April 26, 1961. In the meantime, on April 5, 1961 it filed its complaint in No. 523. Both alleged, *inter alia,* that Respondent's rates and charges were maintained in violation of orders of the Interstate Commerce Commission. The cases were consolidated and tried to the Court without a jury on November 22, 1961.

The District Court made the following findings of fact:

> "Plaintiff's amended complaint in No. 414 and its complaint in No. 523 allege, and its evidence in support of both complaints shows: (1) that the

rates at which defendant performed the transportation for plaintiff from New York, New York, to Lynchburg, Virginia, were higher than its rates from New York, New York, to points further therefrom than Lynchburg, Virginia; (2) that under defendant's rates its liability for loss or damage to property in transit was limited to 50 cents per pound or $50.00 per shipment, whichever was greater, unless plaintiff paid a valuation charge, i.e., a premium over the base rates, of 10 cents per hundred pounds or fraction thereof; (3) that the Interstate Commerce Commission had prior to the performance of the transportation in issue expressed the opinion that rates from New York, New York, to Lynchburg, Virginia, higher than rates from New York, New York, to points further therefrom than Lynchburg were improper, and had admonished carriers maintaining such rates to change them; and (4) that the Commission had prior to the performance of the transportation in issue directed the cancellation of tariff provisions similar to those at which defendant performed the transportation in issue in that they limited the carrier's liability for loss or damage to property in transit to 50 cents per pound or $50.00 per shipment, whichever was greater, unless the shipper paid a valuation charge of 10 cents per hundred pounds or fraction thereof.

"Defendant's evidence shows (1) that the rates at which it calculated the freight charges plaintiff paid *were duly filed with the Interstate Commerce Commission pursuant to Section 217(a)* of the Interstate Commerce Act as the applicable rates for the transportation it performed; (2) that the Interstate Commerce Commission had authorized it to file and maintain the tariff provision under which it limited its liability to plaintiff for loss or damage to property in transit to 50 cents per pound or $50.00 per shipment, whichever was

greater, unless plaintiff paid a valuation charge of 10 cents per hundred pounds or fraction thereof; and (3) that it had in fact filed said provision and in fact maintained it throughout the period during which it performed the transportation in issue. Defendant was not directed by the Commission to cancel this rate until June 2, 1960, long after the transportation of the shipments here in controversy." (App. to Pet. for Cert. pp. 21-23; emphasis the Court's).

Petitioner appealed the District Court's judgment for Respondent to the Court of Appeals for the Fourth Circuit. That Court affirmed the judgment, holding:

"From the evidence presented the District Court found that the challenged freight rates paid by the plaintiff had in fact been duly filed with the I.C.C. as the applicable tariffs for the transportation performed by defendant during the period in question. It also appeared beyond question that while the Commission had criticized these past rates and had admonished the defendant to voluntarily adopt corrective measures, it did not see fit to cancel those rates until new rates were filed on July 2, 1960—after the transportation of the shipments here in question. Concluding that the *T.I.M.E.* decision governed the issues raised, the District Court held that the plaintiff was entitled to no remedy and accordingly dismissed the consolidated actions.

"From an examination of the record as a whole, we are convinced that the District Court's findings are amply supported by the evidence and are clearly correct. The plaintiff asserted that the defendant exacted from it charges greater than those made for similar transportation between more distant points. However, it was shown at the hearing that additional charges were made for the pickup service on the shipments between those points—

charges not imposed on the plaintiff. Thus, it was made affirmatively to appear that the challenged rates from New York to Lynchburg resulted in lower aggregate charges to plaintiff than those cited by it for comparison. Plaintiff's vigorous argument that the *T.I.M.E.* decision is distinguishable is without merit for the reason that the past charges which are attacked as unreasonable were contained in rate schedules duly filed with the Commission and still remaining undisturbed when the charges were made.

"Our conclusion that the plaintiff has failed to carry the burden of proof 'that the rates actually charged exceed the applicable filed rates,' *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, supra, 285 F. 2d at 746, is dispositive of the case, making it unnecessary to consider plaintiff's other contentions." *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, 309 F. 2d 678, 679-680 (4th Cir. 1962)

ARGUMENT

Petitioner contended below, as it contends here, that it paid a valuation charge on shipments of dry goods and related articles assessed by Respondent in violation of an order of the Commission.

Petitioner also contended below, as it contends here, that Respondent maintained and assessed for the transportation performed for Petitioner's members for the shorter distance from New York City to Lynchburg, Virginia class rates that were higher than those it maintained for transportation for the longer distances from White Plains, New York and from New York City to Gretna, Virginia through Lynchburg notwithstanding that the Commission had said in 1949 that such rates were *prima facie* unreasonable and admonished Respondent and other carriers to remove such disparities.

Although Petitioner does not argue this issue here, the principles governing its resolution are the same as those governing the issue on the valuation charge. Therefore, our argument treats with it, as did the findings and conclusions of the District Court and the opinion of the Court of Appeals.

Respondent submits that Petitioner's contentions are not supported by, indeed rest on assumptions contrary to, the facts. To quote from the findings of the District Court, "an examination of the reports and orders of the Commission on which plaintiff relies shows no more than that the Commission enunciated therein principles or criteria by which the reasonableness of rates and tariff provisions would be determined, and admonished carriers to follow those principles or criteria in establishing rates and tariff provisions. The Commission neither found that the particular rates and tariff provisions at which defendant's charges to plaintiff were calculated were unreasonable nor ordered defendant to cancel them." (App. to Pet. for Cert. p. 23.)

Addressing itself specifically to the valuation charge, the District Court found:

> "As to the provision in its tariffs by which defendant limited its liability, it is true that in 1951 the Interstate Commerce Commission disapproved and issued an order requiring the cancellation of similar provisions. However, that order *did not* require cancellation of the specific provision in defendant's tariff of which plaintiff complains. Defendant was not ordered to cancel that provision until June 2, 1960, when the Commission issued its report and order on the complaint plaintiff filed simultaneously with, and as part of, its effort to effect the recovery it seeks here. In that

report the Commission declined to consider the reasonableness of the charges plaintiff had paid defendant in the past, i.e., the charges it seeks to recover in these suits, on the authority of the Supreme Court's opinion in *T.I.M.E., Inc., supra.* Hence, the order thereon merely directed defendant to cancel the provision in its tariff limiting its liability or on before August 10, 1960. Defendant complied with that order by filing a supplement to its tariff, which cancelled said provision as of August 10, 1960." (App. to Pet. for Cert. p. 24; emphasis supplied in part).

Addressing itself specifically to the allegation that the class rates from New York to Lynchburg were *prima facie* unjust and unreasonable in that they were higher than the class rates from White Plains and New York City to Gretna, the District Court pointed out that the Commission was aware of this, but was also aware that such disparities were not unusual at points close to the border between two different rate-making territories.[2] It had therefore declined to order the higher rates cancelled or changed, but rather contented itself with admonishing the carriers to take steps to correct such disparities.

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[2] Lynchburg, Virginia, as well as White Plains, New York and New York, New York are in what is know as Middle Atlantic Territory and the rates between those points are for the most part made collectively by the carriers operating in that Territory through the Middle Atlantic Conference under procedures approved by the Interstate Commerce Commission under Section 5a of the Interstate Commerce Act (49 U.S.C. 5a). Points south of Lynchburg such as Gretna, Virginia and Danville, Virginia are in Southern Territory and the rates between those points and points in Middle Atlantic Territory are for the most part made collectively by the carriers operating between Middle Atlantic Territory and Southern Territory through the Southern Motor Carriers Rate Conference under procedures approved by the Commission under Section 5a.

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Furthermore, to quote from the findings of the District Court, the Commission,

> "in its report on plaintiff's complaint against the specific rates in issue here, which complaint it filed simultaneously with and as a necessary concomitant of its suits here the Commission found that defendant's rates from New York to Lynchburg in fact resulted in lower total charges for such transportation than its total charges for transportation from New York to Gretna or Danville, because the [rates for the] latter transportation, unlike the [rates for the] former, did not include pickup of shipments at New York, for which a separate additional charge was made. Hence, the Commission refused to find defendant's rates from New York to Lynchburg unreasonable and its order did not direct defendant to change them." (App. to Pet. for Cert. p. 24).[3]

The District Court's findings are amply supported by the evidence. Indeed, Petitioner wholly failed to carry the burden the Court of Appeals properly imposed on it when it remanded the case on Petitioner's first appeal, namely "to prove that the rates actually charged exceed the applicable *filed* rates . . ." (285 F. 2d at p. 746; emphasis the Court's). This is clear from the following excerpt from the cross-examination of Petitioner's only witness:

> "Q. Now, do you know whether or not the rates charged by Smith's Transfer Corporation of Staunton, Virginia on the movement of dry goods from New York to Lynchburg during the period

[3] The District Court made no finding whether or not the rates from White Plains were higher to Lynchburg than to Gretna. Whether they were or not is irrelevant because Petitioner's complaint did not allege, nor did Petitioner offer any evidence of any shipments from White Plains.

from January 1, 1953 through June 30, 1960 were rates that were in fact contained in published tariffs filed with the Interstate Commerce Commission and applicable to the transportation performed?

"A. I do not, because I have not checked those rates.

"Q. Do you know what rates were applicable during that period?

"A. I do not at this time.

"Q. Do you know whether or not during that period from January 1, 1953 to June 30, 1960 the applicable rates of Smith's Transfer of Staunton were subject to a valuation charge unless the value were declared and released?

* * * * *

"THE WITNESS: Having not inspected the freight bills, I would not answer that question, I wouldn't know." (Tr. of Evid., pp. 21-22).

As for the Commission's Order of July 27, 1951, upon which Petitioner relies to support its contention that Respondent was without authority to make a valuation charge, there is nothing in it, or in the Commission's report accompanying it, 53 M.C.C. 157, to indicate even that Respondent was one of the carriers to whom the Order was directed, much less that the Commission directed that the particular valuation charges of which Petitioner complains be cancelled. As the findings of the District Court quoted *supra* at pages 9 and 10 correctly state, the Commission did not direct Respondent to cancel the provision in its tariffs for such charges until August 10, 1960. Moreover, the Commission's report accompanying that direction specifically found that Respondent's rates and tariff pro-

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visions in issue there and here had not been shown to be inapplicable as to past shipments, i.e., as to the shipments on which Petitioner seeks recovery here.[4]

CONCLUSION

Petitioner's argument is that the *T.I.M.E.* Case does not bar a shipper from the recovery of damages suffered by reason of a motor carrier's violation of an order of the Commission requiring it to cancel the rates and tariff provisions on the basis of which the shipper's charges for transportation were calculated. But this argument is academic in this case because the factual premise on which it must rest, i.e., the violation of an order of the Commission, is not established by, indeed is contrary to, the facts of record. Since this Court

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[4] The pertinent language of the Commission in its report is:

"Prior to the institution of this proceeding, an action at law seeking damages for the alleged unlawful rates was brought in the United States District Court for the Western District of Virginia. In view of the decision in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, our determination herein concerning the ratings applied and rates charged on past shipments will be restricted to the issue of applicability. *While it is generally alleged that inapplicable ratings and rates have been and are being applied by Smith, the evidence on this issue is confined to the purported failure to apply a mixing rule on certain shipments.*

* * * * * * *

"We find that the released and penalty ratings of the defendant on articles of clothing and dry goods moving from New York to Lynchburg *are, and for the future will be,* unjust and unreasonable. We further find that the assailed ratings and rates on mixed less-than-truckload shipments of general merchandise from and to the same points *were and are applicable, and are not shown to be unlawful.*"

does not resolve academic questions the Petition for a Writ of Certiorari should be denied.

Respectfully,

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